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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAWRENCE DANKER, as Trustee, etc., et al.,

Plaintiffs and Respondents,

v.

BRIAN DANKER, etc., et al.,

Defendants and Appellants.

G040838

(Super. Ct. No. A242665)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Marjorie Laird Carter, Judge. Affirmed.

Deily Law Firm, John P. Deily, Michele Carmeli and Cynthia V. Roehl, for Defendants and Appellants.

Baker & Baker, Paige M. Baker, William E. Baker, Jr., and Brook John Changala, for Plaintiffs and Respondents.

Brian and Karen Danker, husband and wife, appeal an order declaring that a proposed petition filed by Brian's sister, Janis Brown, and his brother, Lawrence Danker, would not violate the no contest clause contained in a 2007 amendment document relating to the Danker Family 1990 Trust (the "original Trust" or the "Trust") created by their parents. Janis and Lawrence's[1] proposed petition seeks to (1) determine the validity of certain trust amendments, including the 2007 amendment document itself, and impose a constructive trust; (2) remove Brian and Karen as trustees and appoint a successor trustee; (3) compel Brian and Karen to account; and (3) establish that Brian and Karen are guilty of elder abuse of the siblings' late mother, Martha Esther Danker.

We find no error in the court's decision, and affirm. To the extent the 2007 amendment purports to affect Janis' and Lawrence's interests in the benefits of the original Trust, or of the Exemption Trust created in the wake of their father's death in February of 2006, it cannot. The 2007 amendment applies only to Maria Esther's "Survivor's Trust," also created in the wake of her husband's death, and she lacked any power to amend the terms of the *other* trusts, or to affect the disposition of *their* benefits, at the time the amendment was executed. Consequently, her 2007 amendment cannot effectively decree what constitutes a "contest" of those other trusts, or alter the circumstances under which a beneficiary might forfeit his or her interests therein.

Of course, the 2007 amendment document, assuming it is otherwise valid, would govern what constitutes a contest for purposes of the Survivor's Trust itself, and thus whether Janis' and Lawrence's proposed petition might cause a forfeiture of benefits under that trust. However, we need not reach that issue, since the 2007 amendment also specifically excludes Janis and Lawrence from sharing in the benefits of the Survivor's Trust. If the 2007 amendment (and thus the no contest clause therein) is valid, then neither Janis nor Lawrence has any interest in the Survivor's Trust, and our assessment of

[1] Because nearly all the parties and significant actors share the same last name, we refer to each by their first names for the sake of clarity. No disrespect is intended.

whether the filing of their petition might work a forfeiture of the interest held by someone who did, would amount to an advisory opinion. We decline to issue one.

FACTS

The original Trust, created by Ralph and Martha Esther in October of 1990, was created for their own benefit and the benefit of their three children, Lawrence, Janis and Brian. Ralph and Martha Esther were named cotrustees.

The Trust specified that during the joint lifetimes of Roger and Martha Esther, the trustees would pay them the net income of the community estate, plus as much of the principal as was necessary to maintain their proper support, and would pay each of them the net income of his or her separate property.

The trust document specified that *during Roger's and Martha Esther's joint lifetimes*, the Trust was both revocable and amendable. However, on the death of the first of these settlors, the trust document obligated the trustees to divide its assets into a Survivor's Trust (composed of the surviving spouse's separate property and his or her share of the community property), an Exemption Trust (composed of the deceased spouse's separate property and his or her share of the community property), and possibly a Marital Trust (composed of a portion of the Exemption Trust corpus if deemed advantageous for specified tax purposes).[2] The surviving spouse would then have the power to amend, revoke or terminate only his or her own Survivor's Trust, but not the Exemption or Marital Trusts.

During the remaining lifetime of the surviving spouse, the original Trust provided that he or she was entitled to the net income of the Survivor's Trust, the Exemption Trust and (if created) the Marital Trust, plus whatever portion of the principal was required for the reasonable support of the surviving spouse.

[2] It appears that no Marital Trust was ever created in this case.

Upon the death of the surviving spouse, the Trust provided that any undisposed portions of the Survivor's Trust and the Marital Trust would be added into the Exemption Trust and distributed equally to their three children in accordance with its terms.

The original Trust also specified that if both Ralph and Martha Esther became unable to serve as trustee during either of their lifetimes (due to incapacity of both, or the death of one and incapacity of the other), then all three children were to serve as cotrustees until the death of the surviving settlor-spouse. On the death of the surviving spouse, all three children were designated as cotrustees of the existing trusts.

The original Trust contained a "no contest" clause which provided that if any heir of Ralph or Martha Esther contested the validity of the Trust, or of a deceased settlor's will, or sought to obtain an adjudication that any provision of the Trust or such will was void, then any interests given to that person under the Trust would be forfeited.

In 1996, Ralph and Martha Esther executed an amendment to the Trust, specifying that if any portion of certain loans made to Lawrence and Janis remained unpaid at the time of the surviving spouse's death, then that unpaid portion shall be counted against Lawrence and/or Janice's share of the ultimate distribution from the Exemption Trust.

According to Janis' and Lawrence's proposed petition, Martha Esther began suffering from the effects of dementia as early as 2003, and was assessed as lacking the mental capacity to make decisions regarding her own medical treatment by 2005. Janis and Lawrence also contend that in 2005, Brian and Karen cut off their ability to communicate directly with either Ralph or Martha Esther.

On October 15, 2005, Ralph and Martha Esther executed a document entitled "Amendment Information for the Danker Family 1900 [*sic*] Trust." That document states that its purpose "is to provide information necessary to prepare an amendment to the Danker Family 1900 [*sic*] Trust." The information outlined in the

document suggests an intention to name Brian and Karen as successor trustees of the trusts, to appoint them as "[co-]agents for healthcare and conservatorship," and to formally designate them as having "power of attorney for management of property and personal affairs." The document also states an intent to arrange for transfer of certain properties to Brian exclusively. The "Amendment Information" document does not itself purport to be an amendment, and it does not contain a "no contest" provision.[3]

On that same date, Ralph and Martha Esther also executed a "First Amendment to The Danker Family 1990 Trust." The amendment deleted the provision naming Lawrence, Janis and Brian as successor trustees of the trusts, and substituted instead a provision naming Brian and Karen to act in that capacity. That amendment does not contain a no contest clause. There is no indication Ralph and Martha Esther otherwise put into effect the proposed amendments outlined in the "Amendment Information" document.

Ralph died on February 7, 2006, four months after execution of the October, 15, 2005 documents.

On January 10, 2007, Martha Esther executed (and presumably sent to Lawrence and Janis) a "Notification By Trustee Under Probate Code Section 16061.7"[4] The document informed the recipients concerning certain basic information regarding the

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[3] In their briefs on appeal, Brian and Karen consistently refer to the "Amendment Information" document as the "2005 Amendment re Beneficiaries", and portray it as a completed amendment to the original Trust. However, by its terms, the document purports only to express Ralph's and Martha's "wish to have . . . changes made in the [original Trust.]" Based upon the record before us, it appears that of the described changes, only the provision substituting Brian and Karen as successor cotrustees was ever actually incorporated into a formal amendment.

[4] Probate Code Section 16061.7 provides in pertinent part: "(a) A trustee shall serve a notification by the trustee as described in this section in the following events: [¶] (1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust. [¶] (2) Whenever there is a change of trustee of an irrevocable trust. The duty to serve the notification by the trustee is the duty of the continuing or successor trustee, and any one cotrustee may serve the notification. [¶] . . . [¶] (f) The notification by trustee shall be served not later than 60 days following the occurrence of the event requiring service of the notification by trustee, or 60 days after the trustee became aware of the existence of a person entitled to receive notification by trustee, if that person was not known to the trustee on the occurrence of the event requiring service of the notification.

original Trust, including the names of the settlors, the date of execution, the identity of Martha Esther as trustee, the fact that Ralph had died on February 7, 2006, and that as beneficiaries, the recipients had the right to request a copy of the "Terms of Trust," but that none was being enclosed with the notice. The document then stated a "warning" that the recipient could not bring an action to contest the Trust more than 120 days from the date of the notification, or 60 days from the date a copy of the terms of trust is delivered to him or her, whichever was later.

Finally, on July 12, 2007, Martha Esther purportedly executed a final "Amendment to the Survivor's Trust Share [of] The Danker Family 1990 Trust" (the so-called "2007 Amendment"). In contrast to the earlier amendment documents which she had signed with her full name of "Martha Esther Danker," the 2007 Amendment was signed only "Esther Danker," and the signature was not notarized.[5] The 2007 Amendment specified that upon Martha Esther's death, the Survivor's Trust was to be distributed solely to Brian, or if Brian were not still living, then to his issue or to Karen. It specifically recited that no provision had been made for distribution to either Lawrence, Janis, or their issue.

The 2007 Amendment also included a "no contest" clause, stating that if any beneficiary of The original Trust, or of any trust created thereunder, contests the validity of (1) the Trust or any of the trusts created thereunder; (2) any of the Trust's amendments; (3) Martha Esther's will; or (4) essentially any other document executed by her affecting her designation of beneficiaries or distribution of property; or makes any other claims to Martha Esther's property, then that person forfeits his or her right to any interest flowing from the original Trust or from any of the trusts created thereunder.[6]

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[5] Janis and Lawrence question the validity of this signature.

[6] Technically, the language of this no contest provision is not actually that clear. The provision begins with the words "If any beneficiary of The Danker Family 1990 Trust, or any trust created under *this trust* . . . contests . . . the validity of any of the following . . ." and concludes with "then the right of such beneficiary to take any interest given to him or her under *this trust* or any trust created pursuant to this trust shall be determined as it would have been determined had such beneficiary predeceased me without surviving issue." (Italics added.) In the context of the provision as a whole, the phrase "this trust" could refer to either the original Trust (the trust

Martha Esther died on September 11, 2007.

On January 10, 2008, Lawrence and Janis filed an application pursuant to Probate Code section 21320,[7] for a court declaration that their proposed probate petition would not trigger the "no contest" clause contained in the 2007 Amendment.

The proffered petition seeks to challenge the validity of the two documents (the "First Amendment to The Danker Family 1990 [sic] Trust" which substituted Brian and Karen as co-successor trustees, and the "Amendment Information" document) dated October 15, 2005, as well as the validity of 2007 Amendment itself. The petition asserts that the challenged trust amendments are invalid because at the time of their execution, the settlors (meaning Martha Esther in 2007, and both Martha Esther and Ralph in 2005) lacked "sound and disposing" mind and were subjected to undue influence by Brian and Karen. The petition also alleges the challenged amendments were not executed or delivered in accordance with Article V of the Trust, and were the product of fraud.

The proposed petition also seeks the removal of Brian and Karen as trustees pursuant to Probate Code section 15642 on the ground they have refused to cooperate with petitioners, who were two of the original successor cotrustees as well as trust beneficiaries, and have failed to keep them informed regarding the Trust. They also allege that removal is proper based upon Brian and Karen's ill-treatment of Martha Esther during her lifetime and their failure to carry out her wishes with respect to the Trust.

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referenced to immediately before the phrase is first employed, and the only trust which actually *has* other trusts created pursuant to it), or to the Survivor's Trust itself (the trust actually amended by the 2007 Amendment) However, the parties do not acknowledge any ambiguity in the phrase, and we presume they have interpreted it as referencing the original Trust, and thus as expressing an intent to impose a forfeiture of any interests flowing from that original Trust. We defer to their interpretation.

[7] Probate Code section 21320 provides in pertinent part: "(a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary . . . would be a contest within the terms of the no contest clause. [¶] (b) A no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) is limited to the procedure and purpose described in subdivision (a). [¶] (c) A determination under this section of whether a proposed motion, petition, or other act by the beneficiary violates a no contest clause may not be made if a determination of the merits of the motion, petition, or other act by the beneficiary is required."

The proposed petition also seeks an accounting on the ground that Brian and Karen have not provided petitioners with any accounting despite the fact they have been acting as "trustees in fact if not in name" for at least three years, and have expressly informed petitioners that the Trust is "none of their business."

The proposed petition's last count, alleging elder abuse, asserts that Brian and Karen's treatment of Martha Esther, during the final year of her life, amounted to neglect as defined in Welfare and Institutions Code section 15610.57, and that additionally, Brian and Karen engaged in financial abuse against both Ralph and Martha Esther as defined by Welfare and Institutions Code section 15610.30 by appropriating Ralph and Martha's property for themselves. The elder abuse count seeks, among other things, damages for the pain and suffering experienced by Martha Esther while in the care of Brian and Karen.

Brian and Karen opposed the application, arguing that the proposed petition constituted a contest of the 2007 Amendment, because the amendment "made a challenge to *any* testamentary instrument, including the 2005 Amendment re Trustees, the 2005 Amendment re Beneficiaries and/or the 2007 Amendment, a contest to the 1990 Trust." Brian and Karen asserted that the 2007 Amendment "reach[ed] back," such that "anyone who challenges any of her 2005 documents gets disinherited." Brian and Karen's opposition included no argument that the proposed petition violated the no contest clause contained in the original Trust,[8] and no argument that the portions of the proposed petition seeking (1) their removal as trustees; (2) an accounting; and (3) a claim for elder abuse, constituted a contest.

[8] Although the documents are not included in our record, the parties' colloquy at the hearing before the probate court suggests it had previously ruled, in connection with an earlier petition, that the proposed challenges to the 2005 amendments would not constitute a contest under the terms of the no contest clause included in the original Trust. It was only after that ruling was made that Janis and Lawrence learned of the 2007Amendment.

After hearing argument, the court ruled that the proposed petition did not trigger the no contest clause contained in either the original Trust or the 2007 Amendment.

I

Brian and Karen contend the probate court erred in concluding that no part of Janis and Lawrence's proposed petition would violate the no contest clause contained in the 2007 Amendment. In assessing this contention, we must keep in mind that "[o]n the one hand, [no contest clauses] are favored since they discourage litigation and give effect to the testator's intent. [Citations.] On the other hand, no[] contest clauses are disfavored because they work a forfeiture. [Citation.] Resolution of these competing policies requires no[] contest clauses be strictly construed and not extended beyond 'what was plainly the testator's intent.' [Citation.]" (*Estate of Watson* (1986) 177 Cal.App.3d 569, 572.)

In this case, we accept that, assuming the 2007 Amendment is otherwise valid, its no contest clause expresses a clear intent to prohibit, as comprehensively as possible, *any* challenge to the last-minute alteration of Martha Esther's testamentary plan in favor of Brian. The terms of the no contest clause provide that if any beneficiary of the original Trust, or any trust created thereunder, takes any of the actions prohibited therein, they forfeit not only their interest under the Survivor's Trust itself, but also under the original Trust and "any trust created pursuant to [it.]" Whether that was truly Martha Esther's own intent, or merely the product of Brian and Karen's scheming as alleged by Lawrence and Janis in their proposed petition, is not the issue before us.

The issue before us is whether such a provision would be violated, and thus trigger a forfeiture of Janis' and Lawrence's interests under the original Trust or any trust created pursuant to it, if they pursue their proposed petition. We conclude it would not.

It appears the 2007Amendment attempted to achieve its goal of discouraging any challenge to Martha Esther's ultimate disposition of her property in two

ways. First, it endeavored to list, as comprehensively as possible, the acts which would be considered a contest.[9] Second, it purported to declare that any such acts would result in a forfeiture of the contestant's interests in *any trust* created pursuant to the terms of the original Trust. Specifically, the 2007 Amendment provides that if any "beneficiary of the [original Trust], or any trust created under this trust" commits any of the prohibited acts, then "the right of such beneficiary to take any interest *given to him or her under this trust or any trust created pursuant to this trust* shall be determined as it would have been determined had such beneficiary predeceased me without surviving issue." In other words, the 2007 Amendment decrees that a violation of its no contest clause constitutes a forfeiture of not only the benefits of the Survivor's Trust, but also the benefits of the original Trust and the Exemption Trust. However, in attempting to decree such a broad forfeiture, the 2007 Amendment's reach rather significantly exceeded its grasp.

Under the terms of the original Trust, it remained revocable and amendable only *during the joint lifetimes* of Ralph and Martha Esther. Thus, assuming the October 15, 2005 "First Amendment" executed shortly before Ralph's death was otherwise appropriate and effective (an issue we do not decide), it would constitute a valid exercise of the right to amend the original Trust.

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[9] Specifically, those acts include: "(1) Contest[ing] or otherwise object[ing] in any court to the validity of any of the following documents or amendments thereto (hereafter "Document" or "Documents") or of any of their provisions: [¶] a. the trust AND its amendments; [¶] b. any sub-Trust created pursuant to the original trust, including the Exemption Trust or the Survivor's Trust; [¶] c. my will; [¶] d. any beneficiary designation of an annuity, retirement plan, IRA, Keogh, pension or profit-sharing plan or insurance policy signed by me; [¶] e. a buy-sell agreement signed by me; [¶] f. a pre- or post-marital agreement signed by me; [¶] g. a family partnership agreement, limited liability company membership agreement, or related operating agreement signed or established by me; or [¶] (2) seek[ing] to obtain an adjudication in any court proceeding that a Document is void, or otherwise seeks to void, nullify, or set aside a Document or any of its provisions; [¶] (3) fil[ing] suit on a creditor's claim filed in a probate of my estate against the trust estate, or any other Document, after rejection or lack of action by the respective fiduciary; [¶] (4) fil[ing] a petition or other pleading to change the character (community, separate, joint tenancy, partnership, domestic partnership) of property already characterized by a Document; [¶] (5) claim[ing] ownership to any asset held in joint tenancy by me, other than as a surviving joint tenant; [¶] (6) fil[ing] a petition to determine domestic partnership property for a cohabitant of mine; [¶] (7) fil[ing] a petition for probate homestead in a probate proceeding of my estate; [¶] (8) fil[ing] a petition for family allowance in a probate proceeding of my estate; [¶] (9) participat[ing] in any of the above actions in a manner adverse to the trust estate, such as conspiring with or assisting any person who takes any of the above actions[.]"

However, once Ralph died, Martha Esther no longer had the right to amend the original Trust. Nor did Martha Esther *ever* have any right to amend the Exemption Trust. In the wake of Ralph's death, Martha Esther's sole authority was to amend the *Survivor's Trust.* And indeed, the *title* of the 2007 Amendment – "Amendment to the Survivor's Trust Share [of] The Danker Family Trust" – seems to acknowledge that limitation. Nonetheless, the no contest clause within that Amendment purports to affect not only a beneficiary's right to take under the Survivor's Trust, but the other trusts as well. That it could not do.

The attempt is understandable, of course. For a no contest clause to be effective, the potential contestants of a will or trust must be given an *incentive* to remain quiet. Generally, that "incentive" is some conditional bequest made within the document to be shielded from contest – some amount less than the potential contestant was hoping for, but too substantial to put at risk – which the contestant would forfeit by challenging the settlor's distributive plan. After all, the original term for a no contest clause was an "in terrorem clause"; it was literally intended to make the potential contestant *afraid* to pursue a contest.

In this case, however, Martha Esther's 2007 Amendment did not retain even a nominal benefit for Janis and Lawrence in the Survivor's Trust. It cut them off entirely, thus removing any fear they might have of forfeiture in connection with *that* trust. Instead, the 2007 Amendment attempted to instill a fear that they would lose their benefits under the *other trusts* if they chose to pursue any action defined as a contest under the 2007 Amendment. But they will not. At the time the 2007 Amendment was created, both the original Trust and the Exemption Trust were irrevocable and not subject to amendment. The benefits flowing to Janis and Lawrence could not be revoked or subject to forfeiture except as already provided for in those trusts. In 2007, Martha Esther had no more authority to set forth *additional bases* for triggering a forfeiture of

Lawrence's or Janis' interests in those trusts, than she did to order the two of them imprisoned for defying her wishes.

Because neither the original Trust, nor the Exemption Trust were subject to amendment by Martha Esther in the wake of Ralph's death, her 2007 Amendment to the Survivor's Trust cannot be relied upon as a distinct basis for decreeing a forfeiture of Janis' and Lawrence's interests in *those* trusts. Consequently, the probate court did not err in ruling that Janis and Lawrence's proposed petition challenging the validity of the 2005 amendment and "amendment information" document relating to the original Trust was unaffected by the no contest clause contained in Martha Esther's 2007 Amendment to the Survivor's Trust.

II

Of course, after Ralph's death, Martha Esther did retain the authority to amend the Survivor's Trust itself, and to impose whatever conditions she wished on the rights of any beneficiary to receive the proceeds of *that* trust. Assuming she was otherwise competent and free of undue influence or duress, she was free to add the most expansive no contest clause that any lawyer might conceive of to that trust, and to use its benefits as the incentive to enforce her wishes.

But as it stands right now, neither Janis nor Lawrence are beneficiaries under that Survivor's Trust. Under the terms of the 2007 Amendment, they are explicitly excluded from sharing in its benefits. Consequently, as pointed out by Brian and Karen, until such time as the 2007 Amendment is decreed invalid, they simply have no standing to seek a court ruling as to whether a proposed petition would trigger a forfeiture of a beneficiary's interests in the Survivor's Trust itself. Under Probate Code section 21320, only a "beneficiary" can obtain a ruling as to whether a proposed petition would violate the terms of a particular no contest clause, and thus work a forfeiture of the beneficiary's interest. To allow someone who is not a beneficiary to obtain such a ruling would amount to an advisory opinion. We do not issue advisory opinions.

In any event, such a ruling could *never* make any difference to Janis or Lawrence. Because the Survivor Trust's no contest provision is contained in the same 2007 Amendment document as the provision excluding them as beneficiaries, there is no scenario under which it could ever be used against either of them. Until such time as they successfully challenge the amendment, and restore their status as beneficiaries under the trust, they would have nothing to lose by trying. And if they are successful in challenging the amendment, they will both restore their status as beneficiaries *and* dispose of the no contest clause in one fell swoop. Ironically, it is only Brian, his issue, and Karen – the sole beneficiaries of the Survivor's Trust under the terms of the 2007 Amendment – whose interests were simultaneously placed at risk by its broad no contest provision. In the absence of some proposed "contest" by any of them, and we can conceive of no reason for that to occur, the issue need never be resolved.

The probate court's ruling that Janis and Lawrence's proposed petition does not trigger the no contest clause in the 2007 Amendment is affirmed. Janis and Lawrence are to recover their costs on appeal.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.